85-1333

Supreme Court, U.S.
FILED
FEB 6 1986
JOSEPH F. SPANIOL, JR.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NIMROD MARKETING (OVERSEAS) LTD.
AND TOM ANDERSON-SLIGHT,
Cross-Petitioners,

v.

TEXAS ENERGY INVESTMENT CORP. AND
ADVANCED TECHNOLOGY, LTD.,
Cross-Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I. QUESTIONS PRESENTED FOR REVIEW

A. Whether, in a promissory estoppel action where the defendant's obligation to pay reliance damages arose under American law, the breach day rule or the judgment day rule is applicable to convert foreign currency into American dollars.

B. Whether, when a cause is remanded requiring use of the judgment day rule, the rate of exchange should be that in effect at the time of the original judgment or at the time of the corrected judgment.

C. Whether, in the situation set out above, interest should be allowed from the date of the original judgment.

II. LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Fifth Circuit are listed in the caption.

Additionally, the following listed persons have an interest in the outcome of this case and are listed in order that the Justices of this Court may evaluate possible disqualification or recusal:

1. Texas Energy Petroleum Corporation
2. James Allison
3. Texas Energy International S.A.
4. Texas Reserve Construction Company

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Cross-Petitioners seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, the writ to issue, however, only in the event this Court grants the petition for writ of certiorari in No. 85-1164, this Term.

V. OPINION BELOW

Reference is made to the Appendix in Petitioners' Brief in No. 85-1164 for the Fifth Circuit's opinion and denial of all parties' Petitions for Rehearing.

VI. JURISDICTION OF THIS COURT

This is a cross-petition filed pursuant to Rule 19.5. The petitioners' petition for certiorari was filed in this court by mailing on January 8, 1986 and was received by cross-petitioner's counsel on January 9, 1986. This cross-petition is being filed not more than 30 days thereafter.

VII. STATEMENT OF THE CASE

This is a diversity action based upon the doctrine of promissory estoppel. Texas Energy formed a joint venture with Nigerian investors to build low-cost housing in Nigeria. Nimrod was to be Texas Energy's purchasing agent. Acting pursuant to *comfort* letters, purchase orders and verbal authorizations, Nimrod began acquiring equipment and materials from Nimrod suppliers. Several months later, between October 31, 1981 and November 4, 1981, Texas Energy informed Nimrod's president, Tom Anderson-Slight, that it was withdrawing from the project.

Nimrod recovered damages for cancellation charges and out-of-pocket expenses incurred. Amounts due and owing by Nimrod to three of its British suppliers were converted by the district court from British pounds sterling to American dollars based upon the exchange rate in effect on the day of the breach of the agreement ($1.90/1 pound sterling). The exchange rate on the date of the final judgment, January 26, 1984 was $1.4045/1 pound sterling. The rate has continued to fall.

The Court of Appeals held that the correct exchange rate should be that in effect on the date a corrected judgment is entered.

VIII. REASONS FOR GRANTING THE WRIT

A. THE RATE OF EXCHANGE TO BE APPLIED TO PLAINTIFFS' DAMAGES REPRESENTING AMOUNTS DUE TO ENGLISH SUPPLIERS SHOULD BE THE DATE OF THE BREACH, AS DETERMINED BY THE DISTRICT COURT, NOT THE DATE OF JUDGMENT.

The breach day rule should apply to determine the conversion rate. In *Hicks v. Guiness*, 269 U.S. 71, 46 S. Ct. 46, 70 L.Ed. 168 (1925) a German firm owed a debt to an American company to be paid in America with the obligation stated in German marks. The Court held that the American company had a claim for dollars as of the date the contract was breached and thus the conversion rate prevailing on that date should apply.

In *Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U.S. 517, 47 S. Ct. 166, 71 L.Ed. 383 (1926) a German bank refused to return marks on deposit when the American depositer demanded them. The court held that at the date of demand the German bank owed no duty to the plaintiff under our law; its liability was fixed at that time in marks. The amount owed should therefore be converted at the rate in effect on the date of judgment.

In *In Re Good Hope Chemical Corp.*, 747 F.2d 806 (1st Cir. 1984), *cert. denied*, ____U.S.____, 105 S. Ct. 2328, 85 L.Ed.2d 845 (1985), Good Hope, a Texas corporation and the Chapter XI debtor, had contracted with K & L, a West German manufacturer, to purchase certain specially fabricated equipment to be paid for by a fixed number of marks. The lower court had reluctantly held that the judgment day rule applied because the debt was to be paid in Germany in German marks. The First

Circuit reversed, holding that the breach day rule applied because the cause of action arose under American law. The First Circuit noted that courts and commentators have drawn from *Hicks* and *Deutsche Bank* disparate formulas for determining when to apply the judgment or breach day rules and that two principal approaches have emerged.

> The first is a rather mechanical approach that focuses on the place of payment. It requires that the judgment day rule apply when the contractual obligation is payable in a foreign country in that country's currency and that the breach day rule apply when the payment is to be made in the United States. 747 F.2d at 810.
>
> Now that the issue is squarely before us, we agree with the district court that a second approach, while more complex, conforms better with the Court's language in *Hicks* and *Deutsche Bank* and the weight of authority. This approach looks to the jurisdiction in which the plaintiff's cause of action arose to determine which rule is applicable. The judgment day rule applies only when the obligation arises entirely under foreign law. If, however, at the time of breach the plaintiff has a cause of action arising in this country under American law, the breach day rule applies. 747 F.2d at 811.

In our case, Texas Energy's obligation to pay Nimrod its reliance damages arose under American law. That fact alone is sufficient to invoke the breach-day rule. Furthermore, Texas Energy's obligation was fixed on the day of breach, November 2, 1981. On that day, Nimrod was entitled to a dollar amount in damages, determined by the exchange rate on that date. Although Nimrod's reliance damages were based, in part, on its own obligations to pay its suppliers in British pounds as deter-

mined by British law, the cause of action presently before this Court concerns Texas Energy's obligation under American law to pay Nimrod in American dollars for Nimrod's reliance damages. Should Nimrod bear the loss and Texas Energy reap the benefit of significant downward flunctuation of the British pound when Texas Energy has refused to pay the damages it owed four years ago? (An even greater disparity will in all likelihood arise if payment is delayed by further appeal.) The answer in equity is "no." Both fairness and controlling case law decree that the exchange rate should be that prevailing on the day of breach.

B. IF THE "JUDGMENT DATE" RULE IS USED, THE EXCHANGE RATE ON THE ORIGINAL JUDGMENT SHOULD BE USED, TOGETHER WITH POST-JUDGMENT INTEREST FROM JANUARY 26, 1984.

There is a precedent for the use of the date of the original judgment as the determining date for the rate of exchange on remand. *Paris v. Central Chiclera, S. de R.L.*, 193 F.2d 960 (5th Cir. 1952) was a breach of contract case where the contract had been entered into in Mexico, and was to be performed there with payment stated only in Mexican currency. The district court had computed the judgment on the basis of the rate of exchange on the date suit was filed. The appellate court determined that the date of judgment was the determining date and gave the following order:

> The judgment is modified and affirmed, and the cause remanded to the district Court with direction to it to make the necessary correction in the judgment appealed from *without changing the date of said judgment* . . . (Emphasis added)

Cross-Petitioners requested that interest at 10.81% be allowed on the judgment from January 26, 1984, the date of the original judgment.

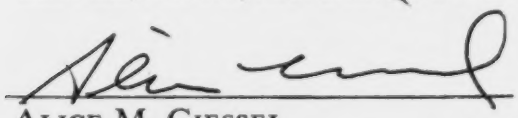
In *Turner v. Japan Lines, Ltd.*, 702 F.2d 752 (9th Cir. 1983), the court found authority under 28 U.S.C. § 1961 (1976) for allowance of interest on remand from the date on which the original verdict was entered for the plaintiff. The court noted with approval and followed the "equitable" construction that the Fifth Circuit has given § 1961 in cases such as *Louisiana Arkansas Railway v. Pratt*, 142 F.2d 847, 849 (5th Cir. 1944) and *Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F.2d 1033, 1048 (5th Cir. 1970). *Turner* at 755.

IX. CONCLUSION

For the foregoing reasons, it is respectfully submitted that, if the Court grants the petition for writ of certiorari in No. 85-1164, then it should also grant this conditional cross-petition for a writ of certiorari.

Respectfully submitted,

GIESSEL, STONE, BARKER & LYMAN



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CROSS-RESPONDENTS' BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW IN CROSS-PETITIONERS' CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-petitioners present the issues of whether the breach day rule or the judgment day rule is applicable in this case; whether the rate of exchange used pursuant

to the judgment day rule should be the rate in effect at the time of the original or at the time of the corrected judgment; and whether post-judgment interest should be allowed from the date of the original judgment or the date of the corrected judgment.

The Judgment Day Rule Is Applicable

Cross-petitioners argue that the rate of exchange in effect on the date of breach should be applied in this lawsuit. Cross-petitioners already set forth the same argument before the Fifth Circuit in their Petition for Rehearing. Cross-petitioners' reliance on the decision of the First Circuit Court of Appeals in *In Re: Good Hope Chemical Corp.*, 747 F.2d 806 (1st Cir. 1984), is misplaced.

The facts in *Good Hope* are distinguishable from the facts in this case and, as the Fifth Circuit decided on August 30, 1985, cross-petitioners' reasoning regarding exchange rates is, therefore, inappropriate. In *Good Hope,* the involved companies were American and West German, and the parties agreed that the contracts gave rise to a cause of action under American law. *Id.* at 807, 812. In the instant case, however, the contracts giving rise to cross-petitioners' alleged obligation to pay cancellation charges were between British companies. The obligation to pay cancellation charges, therefore, arose under British law and, as found by the trial court, Nimrod was entitled to recover a fixed amount of 186,288 British pounds sterling. FFCL, Rec. V. p. 26. The *Good Hope* holding, therefore, is not applicable, and the Fifth Circuit's decision to apply the exchange rate in effect on the date that the district court enters the corrected judgment is appropriate. *Die Deutsche*

Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517, 46 S. Ct. 166 (1926); *Zimmerman v. Southerland,* 274 U.S. 253, 47 S. Ct. 625 (1927); 5 A.L. Corbin, *Corbin on Contracts,* § 1005 (1964).

Additionally, application of the exchange rate on the alleged date of breach would result in a windfall to cross-petitioners because they would receive more dollars than necessary to buy the pounds needed to pay the alleged cancellation charges. Equity dictates that cross-petitioners receive only that amount of dollars necessary to purchase the requisite number of pounds. Since that number of pounds is fixed, and since cross-petitioners have paid no money to any company to date, the only fair method of payment would be by applying the exchange rate in effect on the date the district court enters its corrected judgment.

The Exchange Rate In Effect on the Date that the Corrected Judgment is Entered Should Be Used

Cross-respondents cannot state more clearly or succinctly than did the Fifth Circuit the legal and equitable principles which dictate that the exchange rate in effect on the date of the corrected judgment is entered by the district court is the exchange that should be used in this lawsuit. Cross-respondents, therefore, respectfully direct this Court's attention to the following language from the Fifth Circuit's Opinion in this lawsuit:

> Recovery under the theory of promissory estoppel is limited to "the amount necessary to compensate that party for a loss already suffered." *Sun Oil Co. v. Madeley,* 626 S.W.2d 726, 734 (Tex. 1981);

> *Wheeler v. White,* 398 S.W.2d 93 (Tex. 1965). One recovering under promissory estoppel should not be penalized, nor should one experience a windfall. The contracts call for Nimrod to pay most of the cancellation damages in British pounds sterling. Nimrod has not yet paid those debts and to be made whole should receive the amount in dollars that will purchase the precise number of pounds required for those payments. To avoid both penalty and windfall the court should direct payment in dollars convertible from British pounds sterling based on the exchange rate on the date the corrected judgment is entered.

Nimrod Marketing (Overseas) Ltd. v. Texas Energy Investment Corp., 769 F.2d 1076, 1080 (5th Cir. 1985). This conclusion is made even more inescapable because of the fact that cross-respondents' rightful and justifiable pursuit of the legal rights to which they are entitled should not serve as a basis to, in essence, punish cross-respondents.

Interest Should Accrue as of the Date the District Court Enters Its Corrected Judgment

The Fifth Circuit specifically stated in its Order Denying the Petitions for Rehearing in this lawsuit that the assessment of interest should begin from the date of entry of the corrected judgment. *See* Appendix B to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, filed previously with this Court by cross-respondents [petitioners] in *Texas Energy Investment Corp. and Advanced Technology, Ltd. v. Nimrod Marketing (Overseas) Ltd. and Tom Anderson-Slight,* Cause No. 85-1164 (U.S. Oct. Term 1985). The Fifth Circuit's position in this regard is supported by the statutes of the United States and by the Federal Rules of Appellate Procedure and applicable case law.

Section 1961 of Title 28 states that "interest shall be calculated from the date of the entry of the judgment." 28 U.S.C. § 1961. Pursuant to both Supreme Court Rule 49 and Federal Rule of Appellate Procedure 37, if an appellate court modifies or reverses a judgment with a direction that a judgment for money be entered in the district court, then the mandate shall contain instructions with respect to allowance of interest. The Fifth Circuit has done exactly what Rule 37 dictates it should have done. The reasoning behind this decision is clear. Cross-respondents should not be punished by the imposition of post-judgment interest from January 26, 1984, simply because cross-respondents have rightfully and in good faith pursued their legal rights in this lawsuit pursuant to the proper appellate channels in the American judicial system. The proper date for post-judgment interest to begin accruing, therefore, should be the date that the district court enters its corrected judgment pursuant to the decision rendered by the United States Supreme Court.

CONCLUSION

For the above stated reasons, cross-respondents assert that the rate of exchange should be determined as of the date that the corrected judgment is entered in this lawsuit by the United States District Court for the Southern District of Texas, and that any post-judgment interest

that may accrue should begin accruing as of that same date.

Respectfully submitted,

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